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No. 88-1482

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA,

Petitioner,

v.

ANR PIPELINE COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF SUPPORTING PETITIONER AND *AMICUS CURIAE* BRIEF OF PUBLIC SERVICE COMPANY OF OKLAHOMA AND TRANSOK, INC.

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Amicus parties Public Service Company of Oklahoma (PSO) and Transok, Inc., (Transok), seek leave to file an *Amicus Curiae* Brief supporting Petitioner Corporation Commission of the State of Oklahoma. This Motion is filed because consent to *amicus* status was refused by Respondents ANR Pipeline Company, Colorado Interstate Gas Company, Columbia Gas Transmission Corp., KN Energy, Inc., Mississippi River Transmission Corp., Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Co., and Williams Natural Gas Co. Petitioner and Respondents Southern Natural Gas Company and Western Gas Interstate Company have consented to *amicus* status.

Amicus party PSO is an Oklahoma public service corporation and utility serving one-half million Oklahoma consumers. Much of PSO's electricity is generated by

power stations that burn natural gas. That gas is supplied by long term gas purchase contracts covering Oklahoma natural gas reserves.

Amicus party Transok is an Oklahoma intrastate natural gas pipeline company. Transok operates as an agent-in-fact for PSO in administering PSO's long term gas purchase agreements.

Both PSO and Transok are subject to Oklahoma Corporation Commission Oil and Gas Rule 1-305 and 52 O.S. (1981) § 240, the regulation and statute involved in this case. PSO and Transok are each vitally affected by whether Rule 1-305 applies to interstate purchasers of natural gas. If the rule does not apply to interstate purchasers, then *intra*state purchasers like the *amicus* parties may well bear the full brunt of the rule. In fact, as a result of the decision by the Western District of Oklahoma in this case, the Commission has denied an Application by PSO for a limited deviation from Rule 1-305. The Commission's explicitly stated rationale was that since it had lost jurisdictional authority to enforce Rule 1-305 against interstate purchasers, the Commission would not relinquish any of its authority to enforce the rule against intrastate purchasers. *See* Oklahoma Corporation Commission Cause C.D. No. 141689, Application for Approval of a Limited Deviation from the General Priority Schedule Established by O.C.C.-O.G.R. 1-305, Order No. 324467 at 3 (April 14, 1988).

Furthermore, PSO and Transok are vitally interested in this case because it involves interpretations of the purpose and statutory basis of Rule 1-305. Since Rule 1-305 was promulgated, PSO and Transok have altered their

business practices to comply with the rule, as the rule's intent and effect were repeatedly confirmed by the Commission. Thus, the *amicus* parties have a strong interest in seeing that intent and interpretation affirmed.

The *Amicus Curiae* Brief PSO and Transok propose to file will help this Court decide whether certiorari should be granted in this case. The *amicus* parties can present a perspective on this case not contained in the petition for certiorari, and that is not likely to be adequately presented by Respondents. Because the Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978 were intended by Congress to specifically preserve existing state powers to prevent waste, protect correlative rights, and encourage conservation, it is of vital importance that the historical background of the Oklahoma regulatory scheme be examined. The *Amicus Curiae* Brief submitted with this Motion presents for the Court that historical background.

Additionally, an area not addressed in the petition for certiorari in this case is the Commission's long history of consistent interpretation of Rule 1-305 as a production constraint. The *Amicus Curiae* Brief attached to this Motion demonstrates through specific reference to Commission documents that the original intention of the Commission was to regulate production, and that the regulation of production has been an ongoing concern of the Commission in implementing, and defending the implementation of, Rule 1-305.

Finally, a legal issue not addressed in the petition for certiorari is the necessity of the Tenth Circuit's decision. In the area of constitutional adjudication, this Court has announced a policy of strict necessity in disposing of con-

stitutional questions. If a federal court need not decide a constitutional issue, then this Court's cases mandate that the issue not be decided. The Western District of Oklahoma and the Tenth Circuit have engaged in just such a prohibited, gratuitous pronouncement of unconstitutionality. There are alternative interpretations of section 240 and Rule 1-305 that will allow their constitutionality to be sustained. This involves both interpreting the regulation and statute as a part of a production regulation scheme, and analyzing the priority provision of Rule 1-305 separately from the ratability provision. Even if the ratability provision is impermissible, that does not necessarily mean the priority provision must fall as well.

CONCLUSION

The ultimate decision in this case is very important to PSO and Transok. PSO and Transok do not believe the lower courts fully explored the issues in this case in an attempt to find a constitutional interpretation of section 240 and Rule 1-305. As such, PSO and Transok seek leave to file the attached *Amicus Curiae* Brief to demonstrate the error of the courts below, and to encourage this Court to grant certiorari and require the Tenth Circuit to consider those issues.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF PUBLIC SERVICE COMPANY OF OKLAHOMA AND TRANSOK, INC.

QUESTION PRESENTED

(same as in certiorari petition)

Is the State of Oklahoma pre-empted under the Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978 from exercising regulatory authority over interstate pipelines pursuant to OKLA. STAT. tit. 52 § 240?

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AMICUS CURIAE BRIEF OF PUBLIC SERVICE COMPANY OF OKLAHOMA AND TRANSOK, INC.

Amicus parties, Public Service Company of Oklahoma (PSO) and Transok, Inc., (Transok), submit this *Amicus Curiae* Brief to support Petitioner Corporation Commission of the State of Oklahoma (Commission). A statement of the interest of the *amicus* parties is contained *supra* in the Motion for Leave to File *Amicus Curiae* Brief, bound under this same cover. That statement is incorporated in this Brief for purposes of S. Ct. R. 36.5.

SUMMARY OF ARGUMENT

The Oklahoma regulation struck down by the lower courts is a local production restraint that coincides with federal policies and operates within an area left exclusively to state control.

PSO and Transok support Petitioner's request for certiorari. The lower courts in this case have incorrectly

held unconstitutional an Oklahoma statute and regulation that are designed to limit the lawful production of natural gas. The lower courts' decisions fail to consider the historical context of the statute and regulation involved, and fail to analyze the production restraint basis for the statute and regulation. Because the statute and regulation are production restraints, they neither occupy a field already occupied by federal law, nor conflict with the purposes of the Natural Gas Act of 1938 (NGA) or the Natural Gas Policy Act of 1978 (NGPA).

This Court has always recognized that Congress intended for the States to retain their very broad role in dealing with waste, correlative rights, public safety, and conservation issues. Neither the NGA nor the NGPA were intended by Congress to change the States' role. In failing to heed this Court's pre-emption jurisprudence, and not having available this Court's decision in *Northwest Central Pipe Line Corp. v. State Corporation Commission of Kansas,* 57 U.S.L.W. 4302 (1989), the Western District of Oklahoma and the Tenth Circuit erroneously declared pre-empted 52 O.S.(1981) § 240 and Oklahoma Corporation Commission Oil and Gas Rule 1-305.

This Court should recognize that this statute and regulation are production restraints, that they operate in a manner consistent with congressional policy, and that they are necessary to allow the State of Oklahoma to effectively act in its reserved sphere of power to prevent waste, protect correlative rights, protect public safety, and promote conservation. Accordingly, this Court should grant certiorari outright to reinstate the Oklahoma regulation struck down by the lower courts. Alternatively, this Court should reverse and remand for reconsideration not only in

light of *Northwest Central,* but also whether the statute and regulation can be constitutionally upheld through a narrower, production-oriented interpretation.

HISTORICAL AND LEGAL BACKGROUND OF GAS REGULATION

I. Modern problems facing producing states.

The NGA and the NGPA were both enacted against a back drop of pre-existing state authority. Congress expressed no intent to limit traditional state authority. In fact, as this Court has noted on several occasions, the NGA and the NGPA are *atypical* federal statutes in that Congress specifically intended to limit its role, preserving a very broad state role. The very provisions of the NGA make this clear:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, and industrial, or any other use, and to natural gas companies engaged in such transportation or sale, *but shall not apply to* any other transportation or sale of natural gas or to the local distribution of natural gas, or to the facilities used for such distribution or to *the production and gathering of natural gas.*

15 U.S.C. § 717(b) (emphasis added).

As this Court noted in *Northwest Central,* federal regulations must operate in the context of pre-existing state regulation. When state conservation laws were first

enacted, they were enacted in the context of newly exploited, flush reservoirs. The States' concerns were preventing waste, protecting each owner's right to a fair share of production, and conserving valuable resources. To do that, production had to be curtailed.

Those same concerns exist today. Producing states are still vitally concerned with preventing waste, protecting correlative rights, protecting public safety from production-related hazards, and promoting conservation. However, new circumstances exist in today's gas fields. No longer are most pools flush. After years of production, many pools are nearing depletion. To meet state goals, it is necessary to *mandate production* in certain circumstances.

For example, Rule 1-305 provides for priority protection of hardship, enhanced recovery, and distressed wells. A hardship well must flow at a continuous rate because production below that rate would damage the well and cause waste (such as loss of remaining recoverable reserves). Enhanced recovery wells must be allowed to flow because once a flood front has been established in a secondary recovery project, shutting in the well will result in the flood front being lost and total production declining. That same level of production will not be able to be regained. A distressed well must be allowed to flow at an unrestricted rate due to technical difficulties endangering public safety.

Congress explicitly left traditional conservation, waste, and correlative rights functions to the states. In certain circumstances, such as those described by Rule 1-305, only by mandating production may producing States meet those goals. An order directed to the *producer* mandating

production is of no avail if the *purchaser* is given absolute discretion to refuse to purchase. Thus, the effect of the lower court decisions in this case is to require Oklahoma to choose between allowing a purchaser to shut in a distressed well and threatening public safety, or allowing the producer to vent the gas to the air—the most classic form of waste. Likewise with hardship and distressed wells. When a state can only meet its goals by mandating production, then some effects, direct and incidental, on purchases must be allowed. If Oklahoma is not allowed to "instill the incentive for purchasers" to purchase certain gas, *Northwest Central,* 57 U.S.L.W. at 4305, then the only way to meet the state's goals is to adopt means, such as venting, that squarely conflict with federal goals.

II. Oklahoma's response to these modern problems.

Rule 1-305 was issued by the Commission as an emergency response to an unprecedented market demand imbalance which led to an unprecedented number of ratable take applications and applications for permission to vent gas. Oklahoma Corporation Commission Order No. 246797 at 1. Rule 1-305 was implemented to limit production to available market demand. In times of market imbalance, when supply exceeds demand, this is necessary to prevent waste, protect correlative rights, and promote conservation. Furthermore, because certain wells must continuously produce, even in times of low market demand, the priority schedule of Rule 1-305 was included to protect public safety, prevent waste, protect correlative

rights, and promote conservation.[1]

Rule 1-305 was issued under the authority of 52 O.S. (1981) §§ 239 & 240. *See* Order No. 246797, Finding No. 2. Section 239 provides that whenever full production from a common source of supply exceeds market demand, a *producer* may only take a fair proportion of the gas required to be produced from the common source to meet its limited market demand. Stated purposes of section 239 are to prevent any person from taking a disproportionate share of gas, to protect the public interest, and to prevent discrimination among common sources. *Id.*

Section 240 is an incidental production regulation statute that contains similar proration provisions, requiring that a common purchaser take ratably from all producers in a common source if the purchaser cannot take all of the gas offered for sale. *Id.* Section 240 is intended to go no further than the production regulations contained in section 239. The statutory scheme is obvious. When supply exceeds market demand, production must be constrained to market demand to protect correlative rights and prevent waste. Each constrained producer must be given access to the limited demand to allow him to receive his fair share of production. *In short, sections 239 and 240 go hand in glove.*

---

[1] The rule has two components. The first is vertical priority. Wells are classified into categories one through five (hardship and distressed wells, enhanced recovery wells, casinghead gas, stripper wells, and all others). A purchaser is required to take all gas offered by priority one wells before any gas may be taken from priority two wells, and likewise with the remaining priority categories. The second component of the rule is horizontal ratability. If a common purchaser is unable to take all gas offered within a priority category, then it must take ratably from each well within the category.

III. Rule 1-305 is a ratable production provision.

Although Rule 1-305 uses the first purchaser as the "means," the "end" sought to be achieved is a limitation on excess *production*. A single thread ties section 239, section 240, and Rule 1-305 to the unitary end of restricting excess production ratably so as to protect correlative rights and prevent waste when supply exceeds falling consumptive demand. The very language of sub-section (b) of Rule 1-305 shows the means:

> (b) In the interest of the prevention of waste and the protection of correlative rights, the following priority schedule shall be implemented by any first purchaser of gas whenever the permitted *production* for all wells in any common source of supply in its system in this state . . . is in excess of that purchaser's reasonable market demand . . . .

(Emphasis added). But sub-section (c) shows that the end is plainly *production:*

> (c) When permitted *production* of gas from all wells from which a purchaser or taker is required to take exceeds the market demand of said purchaser or taker, all reductions in gas purchases or takes from wells in each Priority shall be ratable. All *production* from the lower priority wells shall be shut-in before *production* from any well in the next higher priority is curtailed.

(Emphasis added).

The Commission's findings in Order No. 246797, which adopted the rule, show that Rule 1-305 was promulgated directly under section 239 as well as section 240. Those findings also unmistakably confirm the linkage between sections 239 and 240 as aiming at one and the same

thing, namely, limiting excess production to the reasonable market demand:

> The Commission's authority to hear this Cause and promulgate rules and regulations regarding market demand are set forth under the provisions of 52 O.S. 1981, Sections 239 and 240.

Order 246797, Finding No. 2.

> When *production* of gas from all wells from which a purchaser is required to take exceeds the market demand of said purchaser, all reductions in gas purchases shall be ratable among the Priority [Five] wells. All *production* from the lower priority wells shall be shut-in before *production* from any well in the next higher priority is curtailed.

Order 246797, Finding No. 5(12) (emphasis added).

So again, the central thrust of Rule 1-305 is upon limiting producers' *production,* a thrust stemming from reading section 239 and section 240 not as parallel tracks but as two intersecting means to the very same end. This appears plainly from the Commission's clarification order, Order 281285.

> It must be emphasized that Section 240 does not stand alone in its application; that it must be read in conjunction with Section 239 as a means for accomplishing the state's objective.

Order No. 281285, A-55. With this ruling, the Commission essentially adopted the reasoning urged by the Oil and Gas Conservation Division of the Oklahoma Corporation Commission:

> Secondly, and most importantly, these ratable

> take provisions are essentially directed at producers of natural gas. It stands to reason that if takers are required to take ratably, then the producers are only permitted to produce ratably. It is the taker that controls the [valve] . . . that controls the production. If the taker can only take so much in light of its demand, then the producer can only produce that amount. . . . It is the Oil and Gas Conservation Division's position that *the ratable take and priority regulations are targeted at producers and production of natural gas,* and . . . will not impermissibly interfere with interstate commerce.

Reply Brief of the Commission Conservation Division (Cause No. 28770) at 3-4 (emphasis added).

The Commission continued this line of defense before the Oklahoma Supreme Court in *Panhandle Eastern Pipe Line Co. v. Corporation Commission,* Appeal No. 64890.

> The Oklahoma scheme is markedly different from Mississippi's. The purpose of Oklahoma's ratable take statute, 52 O.S. § 240, is to enforce its ratable production statute, 52 O.S. § 239. The Commission's exercise of jurisdiction over interstate pipelines is therefore incidental to its jurisdictional mandate to regulate production pursuant to Section 239 and a tool for enforcing such production regulation. Order No. 281285, p. 6. Section 239 requires an owner to restrict his production to his proportionate share of the market demand. Under Section 240, a purchaser may take only that share and no more. Therefore, even if an owner contracts with a purchaser to sell the entire stream from a well, if the stream

> is in excess of that owner's proportionate share of the market demand, the owner can only legally produce his proportionate share and the purchaser can only legally purchase that share.

Answer Brief of Appellee Corporation Commission of Oklahoma (Appeal No. 64890) at 5. Thus, the regulatory scheme is not to constrain purchasers per se from purchasing, but only to prevent a purchaser from taking gas that may not be legally *produced.*

This legal production concept is key to understanding the operation of Rule 1-305. A purchaser may not take gas that cannot be legally produced; Rule 1-305 defines legal production, and incidentally (and entirely permissibly) uses purchasers as an enforcement means. The Commission stated in the *Panhandle* appeal:

> The differences in Oklahoma's regulatory scheme are significant. A purchaser is not required to increase its takes. A purchaser may reduce its take-or-pay liability since it can only take legally produced gas which may differ from its contracted amount.

Answer Brief of Appellee Corporation Commission of Oklahoma (Appeal No. 64890) at 8-9.

The Commission order leading to this appeal, Order 281285, is replete with examples of the Commission's intent that Rule 1-305 is a production regulation promulgated under a statutory production restraint scheme.

> Rather, the Commission is of the opinion that it is, in fact, exercising incidental jurisdiction over takes of gas while regulating production and furthering the legitimate state interest in protecting correlative rights and preventing waste.

Order 281285, A-58.

> [I]t seems only logical that when production is dictated by pipeline capacity and demand and limited by this agency's setting of an allowable, the pipeline must be an integral part of that production function and regulation. Section 239 sets forth the circumstances under which prorating occurs and Section 240 provides a means of enforcing proration requirements.

Order 281285, A-59-60.

> The establishment of priority rules and enforcement of ratable take provisions of Sections 239 and 240 are a reasonable means of protecting correlative rights and preventing waste while regulating the production of natural gas from a common source of supply.

Order 281285, A-66.

> The regulation of natural gas takes by interstate pipelines is an incident of the exercise of this Commission's jurisdiction over the regulation of the production of natural gas from a common source of supply. The exercise of this incidental jurisdiction is necessary in order to protect correlative rights and prevent waste.

Order 281285, Finding No. 1, A-66.

> Sections 239 and 240 and the regulations promulgated thereunder attempt to accommodate interests of both producer and pipeline by adjusting production of natural gas to demand thereof. The state's interest is furthered by this method by ensuring that production is uniform throughout the common source of supply, protecting against drainage, thus, protecting the cor-

> relative rights of all owners of an interest in the natural gas. Any effect such regulation has on interstate commerce is minimal.

Order 281285, Finding No. 2, A-67.

Oklahoma's scheme is a classic example of permissible production regulation. This type of regulation has been described by prominent commentators as follows:

> Another type of prorationing, called *market demand prorationing,* is concerned with supply and demand; it is a device for limiting production to estimated market demand . . . ."

H. Williams, R. Maxwell, & C. Meyers, Oil & Gas at 16 (1979).

ARGUMENT AND AUTHORITY

I. Unnecessary constitutional questions should not be decided.

Since *Hayburn's Case,* 2 Dall. 409 (1792), the Court has followed a policy of strict necessity in disposing of constitutional issues. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 105 (1944). *See also Rescue Army v. Municipal Court of Los Angeles,* 331 U.S. 549, 568-71 (1947); *Ashwander v. TVA,* 297 U.S. 288, 345-49 (1936) (Brandeis, dissenting); *Burton v. United States,* 196 U.S. 283, 295 (1905). If the Oklahoma statute and rule challenged in this case are susceptible to a constitutional construction, then they must be so interpreted to avoid unnecessary decisions on constitutional issues. *International Association of*

Machinists v. Street, 367 U.S. 740, 749, 750 (1961).

In this case, the lower courts violated this Court's long standing constitutional adjudication principles in two ways. First, they struck down the priority provision of Rule 1-305 along with the rule's ratability provision, without considering whether the priority provision was independently constitutional, and severable. Second, they struck down the ratability provision without considering whether Rule 1-305 was a *ratable production regulation* as opposed to a *ratable purchasing regulation.* If Rule 1-305 may be implemented under a ratable production statute, it is clearly constitutional, and decision under an alternative interpretation holding the statute unconstitutional is unnecessary.

II. Pre-emption Principles.

State law is pre-empted only when pre-emption is necessary. Congress may explicitly pre-empt a certain regulation. *Northwest Central,* 57 U.S.L.W. at 4306 (1989). This case does not involve a question of explicit pre-emption, and thus must be analyzed as this Court analyzed a similar Kansas regulation in *Northwest Central.* Absent explicit pre-emption, pre-emptive intent is inferred only when Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law. *Northwest Central,* 57 U.S.L.W. at 4306.

A. *Field Pre-emption.*

When it enacted the NGA, Congress was cognizant of existing state regulation over waste, conservation, and correlative rights, and carefully limited federal power. "It

'did not envisage federal regulation of the entire natural gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act'." *Northwest Central,* 57 U.S.L.W. at 4306 (quoting *FPC v. Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 502-03 (1949)). Thus, *general* pre-emption standards do not apply with full force to the NGA and to the NGPA. Instead, congressional intent *with these particular statutes* was to leave as much power to the States as possible. Congress recognized that producing States had extensive pre-existing regulations to prevent waste, promote conservation, and protect correlative rights. Congress did not want to interfere with those traditional state powers. In considering pre-emption of state oil and gas regulations, this Court has noted that "[t]o avoid the encroachment of the powers Congress intended to reserve to the States, we must be careful that we do not 'by an extravagant . . . mode of interpretation push powers granted over transportation and rates so as to include production'." *Northwest Central,* 57 U.S.L.W. at 4307.

The power "to allocate and conserve scarce natural resources" remains with the States after the enactment of the NGA. *Northwest Central,* 57 U.S.L.W. at 4307. This includes specifically the power to regulate production rates. *Id.* Congress's express intent in enacting the NGA was to leave with the States all power they had when the Act was promulgated. As this Court noted in *Northwest Central,* the "NGA is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions: they retain all the State power they have at the present time,' 81 Cong. Rec. 6721 (1937) . . . ." *Northwest Cen-*

tral, 57 U.S.L.W. at 4307.[2]

The legislative history of the NGPA also demonstrates that the same traditional state powers survived its enactment. "The House Energy Committee Chairman told Congress that the NGPA 'does not contemplate that FERC will intrude into the traditional conservation functions performed by the states. This is a matter reserved to the state agencies who, in the exercise of their historical powers, will continue to regulate such matters as . . . production rates.' 124 Cong. Rec. 38366 (1978)." *Northwest Central,* 57 U.S.L.W. at 4307 n.9.

The pre-emption analysis in the present case must be exceptionally sensitive to the historical development of Oklahoma conservation laws. The statute involved in this case had been promulgated and enforced two decades prior to the enactment of the NGA. The statutory scheme under consideration is one of the background laws of which Congress was fully aware when it enacted the NGA, and of which Congress specifically intended not to pre-empt. Because of the specific design of Congress in the NGA, and the NGPA, a very persuasive case must be made before Rule 1-305 and section 240 are found to be pre-empted.

In applying field pre-emption in this area, this Court has found pre-emption only where a state directly regulates interstate pipelines "in such a way to affect their cost structures." *Northwest Central,* 57 U.S.L.W. at 4307.

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[2] *See also* H. R. Rep. No. 709, 75th Cong. 1st Sess., p. 2 (the Act "takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory authority."); *Panhandle Eastern Pipe Line Co. v. Public Service Commission,* 332 U.S. 507, 517 (1947) ("The Act, though extending Federal regulation, had no purpose or effect to cut down state power.")

Field pre-emption only exists when the state regulation interferes with transportation and rates. *Id.* at 4306 n.8; *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi,* 474 U.S. 409, 422-23 (1986); *Northern Natural Gas Co. v. State Corporation Commission of the State of Kansas,* 372 U.S. 84, 94 (1963). In fact, with the passage of the NGPA, Congress supplanted much of the FERC's jurisdiction with respect to purchasing practices. Now Chief Justice Rehnquist's comments in his dissenting opinion in *Transco* apply fully to this case:

> Moreover, to the extent the NGPA ever controlled the wellhead price of such gas, those controls have long since been eliminated. Therefore, *Northern Natural* does not govern this case. Rather, the issue is whether Mississippi's ratable-take rule stands as an obstacle to the full accomplishment of the NGPA's purpose. . . . State regulation that merely defines property rights or establishes contractual rules, however, does not interfere with this purpose.

Transco, 474 U.S. at 432-33.

B. *Conflict Pre-emption.*

Rule 1-305 is consistent with federal aims. The goal of the NGA and NGPA is to provide adequate supplies of gas at reasonable market prices. Adequate supplies of gas may only be provided if states are free to regulate in such a manner to assure priority production of hardship and distressed wells, enhanced recovery wells, and casinghead gas. If a state is not free to mandate production of those prioritized wells, then reserves will inevitably be lost. Additionally, since ratepayers have borne the costs of connections to those wells, if reserves are lost, the return on the ratepayer's investment will be decreased, and additional

expenses will be incurred. Furthermore, there is no offsetting benefit to allowing a purchaser to discriminate in its purchases. Assuming as this Court did in *Transco,* 474 U.S. at 412, that the "prevailing industry practice" is to utilize contracts with take-or-pay provisions, then required contract payments for gas not taken will make any cost savings illusory.

RELIEF REQUESTED AND CONCLUSION

The lower courts improperly struck down a constitutional, non-pre-empted production restraint. This Court should grant certiorari to correct this error outright or at least reverse and remand for reconsideration, especially in light of *Northwest Central,* whether the Oklahoma restraint can be constitutionally supported as a production regulation committed exclusively to state control.

Respectfully submitted,

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